



Baka v. Hungary: chilling effect on Hungarian judges

Briefing by:

Amnesty International Hungary
Hungarian Helsinki Committee

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What is the Baka v. Hungary case about?

- **Undue and premature termination of the applicant's mandate as President of the former Hungarian Supreme Court** through legislative acts of constitutional rank and therefore beyond judicial control;
- **Prompted by views and criticisms he expressed on reforms affecting the judiciary;**
- **Exerting a "chilling effect"** also on other judges discouraging them "from participating in public debate on legislative reforms affecting the judiciary" and "on issues concerning the independence of the judiciary"

Violation of **Articles 6 and 10** of the ECHR

Overall assessment of the status of execution

The Hungarian authorities

- not only **failed to take any measures at all to implement the judgment**, but
- **further deepened the chilling effect** on the freedom of expression of judges, and
- continued to **undermine the independence of the judiciary** in general.

Particular aspects of failing to implement the judgment:

- no safeguards introduced against *ad hominem* legislation aimed at terminating a judicial mandate;
- no measures taken to guarantee that judicial mandates will not be terminated without effective safeguards against abuse;
- no measures taken to counter the “chilling effect”, and no guarantees adopted to avoid any retaliation against judges publicly voicing criticism

Overview of the context

- The governing majority has **been systematically undermining the independence of the Hungarian judiciary** since 2011 through different **legislative and organisational steps** (some of these were among those reforms that were criticised by Mr Baka), incl. the centralization of the administration of courts and establishing the National Office for the Judiciary (NOJ);
- To prevent judges from speaking out publicly against these measures (**chilling effect**), **a number of different methods** have been applied by the incumbent majority:
 - **Undermining the credibility of the judiciary** as a whole through public statements by high-ranking politicians;
 - **Attacks** in the government-affiliated media **on individual judges** who speak out;
 - **Administrative and financial pressure** on dissenting judges made possible by vaguely formulated laws and internal policies (exercised through court presidents);
 - The legislation **fails to guarantee that judges** who are unlawfully dismissed **are to be reinstated into their previous judicial leading administrative position** if the court orders their reinstatement as judges.

Structural deficiencies that contribute to a chilling effect remain in place

(examples)

1. Integrity Policy used to sustain the climate of self-censorship

- Provisions on judges' potential involvement in "political activities" are unclear, thus open for arbitrary interpretation. Integrity Policy used as a tool to silence judges who would want to speak up in defence of their judicial independence

2. Detailed recommendations of the National Judicial Council (NJC) to eliminate the power imbalance with NOJ President disregarded (Resolution 99/2018)

- The NOJ President has the power to annul any call for applications for court leadership positions and render the procedure unsuccessful without the consent of any judicial body: in 2020, 20 applications for leadership positions were invalidated by the new NOJ President. Capable of contributing to the chilling effect on the freedom of expression of judges, and are consciously kept in the legislation
- No legal personality and administrative infrastructure for NJC
- Amendment of internal policy regarding exempting NJC members from judicial tasks to carry out NJC related tasks

3. Full discretion in the distribution of fringe benefits, bonuses

- legislative basis of some of the fringe benefits is very vague, leaving much room for arbitrariness
- discretionary decision of the employer whether or not to allow the judge to participate in the activities that serve as the basis of granting the bonuses

New
developments
contributing to
the chilling
effect
I.

Statements by high-ranking government politicians continue

- Máté Kocsis, parliamentary faction leader of ruling party Fidesz about suspended imprisonment imposed for possessing paedophile photographs: the judgment is “*outrageous and unacceptable*” (July 2020).
- Tamás Deutsch, MEP of Fidesz about acquittal of Béla Kovács, former MEP of opposition party Jobbik of espionage charges: talks about „independent” Hungarian courts (in quotation marks) and calls the acquittal „*net high-treason*” (September 2020).
- First time that new NOJ President speaks up against such communication, but adds that it is only the first instance decision which may be overruled at the second instance. In June 2021, the judgment is overruled and Béla Kovács is found guilty of preparing espionage.

<https://euobserver.com/democracy/152349>

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II.

Judge forced out from the judiciary for political reasons

- Judge Gabriella Szabó made preliminary reference to CJEU in 2018, because she deemed one of the cornerstones of the HU Government's asylum policy (asylum claims of people arriving through a safe country, such as Serbia, are manifestly ill-founded) might contradict EU law. In March 2020, the CJEU shared her stance.
- Her three-year tenure ended in June 2021. In March 2021, her employer concluded her evaluation by deeming her unsuitable for a judicial position.
- Evaluation disregarded the opinion of the relevant section head of the Kúria (second instance court in cases Judge Szabó was hearing), who thought that she was suitable to remain a judge, the problems identified in the evaluation process were minor and could be remedied.
- Judge Szabó had to hand over her cases before her mandate expired: in one of the cases, her pending preliminary question (in another asylum case) was withdrawn by new judge.
- Venice Commission in 2012: fixed-term appointments and aptitude tests as regulated in Hungary can be problematic from the perspective of the independence of the judiciary: pre-emptive obedience, too much power in the hands of court presidency.

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III.

Election of an external actor as President of the highest judicial body

- the election of András Zs. Varga as President of the Kúria (Hungary's highest judicial body) was **made possible by** three separate *ad hominem* legal amendments.
- Mr Varga never served as a judge within the ordinary court system; as an academic, he advocated for limiting the independence of the judiciary
- was elected as a **one-party political appointee** in complete **disregard for the manifest objection of the NJC** – this is in itself capable of exerting a chilling effect amongst judges (most directly amongst Kúria judges)
- became an ex officio member of the NJC, is therefore directly involved in the work of the NJC and **may put NJC members under pressure**
- holds the same **unlimited and uncontrollable powers** in relation to the appointment of judges and judicial leaders at the Kúria as the NOJ President with regard to the lower courts (over 20% increase in the number of Kúria judges in 2020: positions to be filled by Mr Varga)

Evaluation of the 2021 Action Report of the Government

1. Non-implementation of the general measures required with respect to the breach of Article 6

2. Non-implementation of the general measures required with respect to the breach of Article 10

- 1383rd CM-DH meeting: the Hungarian government undertook “to evaluate the domestic legislation on the status of judges and the administration of courts”
- a thorough de iure analysis of the Hungarian legislation identifying provisions capable of exerting a negative influence on judges would have been required – not undertaken
- instead, the Action Report refers back to a survey, but:
 - (i) survey was already presented in 2020, so it has already proven to be insufficient for the execution of the judgment in 2020,
 - (ii) its results can be contested:
 - low participation rate (17%) reflecting mistrust,
 - none of the survey questions refer to the freedom of expression of judges,
 - lack of transparency & unclear methodology,
 - can also be called into question based on two reports by Amnesty International Hungary

Recommendations

- **Protect the integrity of the NJC's judge members** and guarantee that they can exercise their statutory rights and obligations of safeguarding judicial independence **without any undue interference**;
- Amend the legislation providing the NOJ President with **overly broad and excessive powers** regarding the appointment of court leaders;
- Provide a **thorough *de iure* analysis** of the Hungarian legislation identifying provisions capable of exerting a negative influence on judges;
- **Refrain from and condemn any public harassment, intimidation or retaliation against judges; abstain from** any public critique, recommendation, suggestion or solicitation regarding court decisions that may constitute **direct or indirect influence** on pending cases or otherwise undermine the independence of judges;
- Ensure that the **remuneration of judges** is based on a general standard and rely on objective and transparent criteria and **phase out bonuses** which include an element of discretion, and therefore potential arbitrariness;
- Amend the law to ensure that **judges may be reinstated to their former leadership** position after it is concluded that their dismissal was unlawful;
- **Address the issue of judicial independence holistically and comprehensively**, in line with the respective international standards and the specific recommendations for Hungary by international bodies.

Thank you for your attention!



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